(5)

No. 86-871

Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,
RALPH S. TYLER, III,*
ANDREW H. BAIDA,
RICHARD M. HALL,
KATHIE A. STEIN,
MICHAEL C. POWELL,
CHARLES R. TAYLOR, JR.,
Assistant Attorneys General,
Munsey Building, 2nd Floor,
Seven N. Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6342,
Counsel for Respondents.

* *Counsel of Record*

The Daily Record Co., Baltimore, MD 21202

TABLE OF AUTHORITIES

Cases

Page

Carr v. Zaja,
283 U.S. 52 (1983).....6

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895).....5

United States v. DiLapi,
651 F.2d 140 (2d Cir. 1981),
cert. denied, 455 U.S. 938 (1982)....6

Rules

Fed. R. App. P.

41(a).....4,n.6,5
41(b).....5

Sup. Ct. R.

22.6.....2,n.2
40.3.....2,n.1

Books

R.L. Stern & E. Gressman,
Supreme Court Practice
(5th ed. 1978).....6

No. 86-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the Attorney General of Maryland[1] and the Secretary of the Maryland Department of Health and Mental Hygiene ("the State"), submit this supplemental brief to call the Court's attention to an important factual and legal development which occurred subsequent to the filing of the State's Brief in Opposition.[2] On January 15, 1987, the United States District Court for the District of Maryland (Black, J.), following the duly issued mandate of the United States Court of Appeals for the Fourth Circuit, dismissed this case. The district court's Order and

---

[1] This case is against the Attorney General in his official capacity only. Stephen H. Sachs was the Attorney General of Maryland until January 12, 1987, when the current Attorney General, J. Joseph Curran, Jr., was sworn in by the Governor of Maryland. Pursuant to Supreme Court Rule 40.3, Attorney General Curran is substituted herein as a respondent. However, in the interest of avoiding confusion and because no formal order of substitution has been entered, the case caption has not been changed.

[2] See Supreme Court Rule 22.6.

Judgment is reproduced in full in the appendix hereto.

Petitioner, Potomac Electric Power Company ("PEPCO"), in its Supplemental Brief and again in its Reply Brief concedes that the sole issue presented by its petition is moot in light of the State's suspension of its criminal investigation of PEPCO.[3] See, e.g., Reply Brief at 1-2.[4] Nevertheless, PEPCO asks this Court to remand this case to the Fourth Circuit for proceedings on the merits of PEPCO's claim that Maryland's PCB hazardous waste disposal laws are preempted

---

[3] The sole issue presented by the petition is whether the Fourth Circuit was correct when it held that the doctrine of Younger v. Harris, 401 U.S. 37 (1971), applies to state grand jury proceedings.

[4] "In light of the State's decision to suspend its investigation of PEPCO, the only issue presented in the petition - the propriety of abstention in favor of a state grand jury proceeding - has been rendered moot." PEPCO's Reply Brief at 1-2 (footnote omitted).

by federal law. E.g., Id. at 4.[5] Clearly, this request is not appropriate now. There is no basis for further proceedings because (1) the case has been properly dismissed, and (2) the appeal period for the district court's order of dismissal has expired and no appeal has been noted.[6]

The judgment of the Fourth Circuit in this case was entered on October 17, 1986. See 802 F.2d 1527 (reprinted in the Appendix to PEPCO's petition (Pet. App.) at App. 1a, 10a). Thus, because PEPCO never filed a motion pursuant to F.R.App.P. 41(b) to stay

---

[5] The district court held that the State's laws are not preempted. 639 F.Supp. 856 (D.Md. 1986) (reprinted in the Appendix to PEPCO's petition at App. 31a).

[6] The district court's final Order and Judgment is dated January 15, 1987, and it was entered January 16, 1987. See Appendix. Thus, the final date for appeal was February 17, 1987, as "30 days after the date of entry of the judgment," F.R.App.P. 4(a)(1), was February 15, a Sunday, and February 16 was a holiday. As of March 2, 1987, no notice of appeal has been filed.

the issuance of the mandate, the Fourth Circuit's mandate issued - as it was required to issue - 21 days after the entry of judgment. F.R.App.P. 41(a).[7] That mandate directed the district court to dismiss this case: "On remand, PEPCO's action must be dismissed and its claims pursued in Maryland courts." 802 F.2d at 1532 (Pet. App. at 19a).

The district court, of course, had no alternative but to carry out the unequivocal terms of the Fourth Circuit's order of dismissal as there was no stay, or even a Fed.R.App.P. 41(b) request for a stay, of that order. See In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895) ("The circuit court is bound by the decree as the

---

[7] F.R.App.P. 41(a) provides, in part, as follows: "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order."

law of the case, and must carry it into execution according to the mandate."). Plainly, the fact that PEPCO filed a petition for certiorari does not operate "as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court." R.L. Stern & E. Gressman, Supreme Court Practice 847 (5th ed. 1978) (footnote omitted). Similarly, issuance of the mandate by the Fourth Circuit terminated that court's jurisdiction. United States v. DiLapi, 651 F.2d 140, 144 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982).

The issuance of the Fourth Circuit's mandate "does not defeat the jurisdiction of this Court." Carr v. Zaja, 283 U.S. 52, 53 (1931). Here, however, petitioner no longer asks this Court to exercise its jurisdiction to decide the sole question presented by its petition because it concedes that that question is moot. Rather, PEPCO asks this Court

not to decide the question raised by its petition while simultaneously asking this Court to remand this case to the Fourth Circuit where that court would be asked to decide the merits of a dismissed case.

The altogether proper, indeed mandatory, dismissal of this case by the district court, pursuant to the properly issued mandate of the Fourth Circuit, brings this matter to an end. PEPCO's dogged efforts to resuscitate and prolong this case should be rejected. There is no reason to remand to the Fourth Circuit for further proceedings.[8]

---

[8] See also State's Brief in Opposition at 21-26 (arguing that absent the threat of criminal prosecution there is no justiciable case or controversy).

PEPCO's petition for a writ of certiorari should be denied.

Respectfully submitted

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
*
RALPH S. TYLER, III
ANDREW H. BAIDA
RICHARD M. HALL
KATHIE A. STEIN
MICHAEL C. POWELL
CHARLES R. TAYLOR, JR.
Assistant Attorneys General
Munsey Building, 2nd Floor
Seven N. Calvert Street
Baltimore, Maryland 21202
(301) 576-6342

* Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE POTOMAC ELECTRIC POWER COMPANY	:	
v.	:	CIVIL ACTION NO. B-86-220
STEPHEN H. SACHS, in his capacity as Attorney General of Maryland, et al.	:	

ORDER AND JUDGMENT

By opinion rendered on October 17, 1986, the United States Court of Appeals for the Fourth Circuit reversed this Court's decision in the captioned litigation, and remanded the action for dismissal of plaintiff's claims.

Accordingly, IT IS, this 15th day of January, 1987, ORDERED and the same hereby IS, DISMISSED.

(signed)
Walter E. Black, Jr.
United States District Judge

✓ Filed ✓ Entered
✓ Received
January 16, 1987
at Baltimore
Clerk, U.S. District Court
District of Maryland